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>>ALERT

SECOND CIRCUIT RULES THAT TITLE VII PROHIBITS DISCRIMINATION ON BASIS OF SEXUAL ORIENTATION

The Second Circuit (which has jurisdiction over New York, Connecticut, and Vermont) is now one of two circuit courts holding that discrimination based on sexual orientation is a form of sex discrimination, and prohibited under Title VII of the Civil Rights Act of 1964 (Title VII).

The Seventh Circuit (covering Illinois, Indiana, and Wisconsin) and the Equal Employment Opportunity Commission (EEOC) have also taken the same position. However, the U.S. Court of Appeals for the Eleventh Circuit (which covers Alabama, Florida, and Georgia) is the only other federal appellate court to decide this issue to date, and has held that sexual orientation is *not* protected under Title VII.

Though courts have yet to reach a consensus on this issue, the Second Circuit's decision in *Zarda v. Altitude Express, Inc.* is a sign that protections for LGBTQ employees under Title VII is increasingly becoming a focus for the courts.

THE BOTTOM LINE

The *Zarda* decision deepens the growing split between the circuit courts on the issue of whether discrimination based on sexual orientation is prohibited under federal law. It is now more likely that the U.S. Supreme Court will ultimately have to determine whether federal law should recognize sexual orientation as a protected class. In the meantime, 22 states and at least 400 cities and counties, including New York and New York City, already have laws in place prohibiting discrimination on the basis of sexual orientation, transgender status, gender identity, and/or gender expression. Employers should consult with counsel to ensure that their anti-discrimination and anti-harassment policies comply with all applicable federal, state, and local laws. Additionally, management and HR departments should establish best practices on how to properly navigate such matters.

ZARDA v. ALTITUDE EXPRESS, INC.

Donald Zarda (Zarda), was a gay male skydiving instructor employed at Altitude Express, Inc. (Altitude). Zarda was fired after a customer complained that he inappropriately touched her during a tandem skydive and "disclosed his sexual orientation to excuse his behavior." Zarda, who denied inappropriately touching the customer, subsequently filed suit in federal court alleging that Altitude terminated his employment because he disclosed his sexual orientation.

Zarda's Title VII claim was initially dismissed due to a then-controlling Second Circuit case, *Simonton v. Runyon*, which held that a sex discrimination claim under Title VII could not be based on a plaintiff's sexual orientation. The Second Circuit granted Zarda's request to revisit *Simonton*, however, and overturned it on appeal.

COURT'S DECISION AND UNDERLYING ANALYSIS

In overturning *Simonton*, the Second Circuit held that sexual orientation discrimination is a type of sex discrimination prohibited by Title VII. In reaching this conclusion, the court relied on three main theories:

1) An employer cannot discriminate on the basis of sexual orientation without taking the employee's sex into consideration, because "sexual orientation is defined by one's sex in relation to the sex of those to whom

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one is attracted." The court illustrated this point with a hypothetical, explaining that if an employer fails to promote a female employee because she dates women but does not do the same with a male employee who dates women, this difference in treatment is based on sex, because "but for" the employee's sex, the female employee would not have been denied the promotion.

2) Sexual orientation discrimination is a form of sex stereotyping (which is also prohibited under Title VII) because it is rooted in "stereotypes about how members of a particular sex should be, including to whom they should be attracted."

3) Associational discrimination (i.e., discriminating against an employee because of the employee's association with a person of a particular race, national origin, or other protected class) has long been recognized as a violation of Title VII. The court found that the same reasoning could be applied to discrimination on the basis of same-sex romantic relationships, because the employer's actions are "predicated on opposition to romantic association between particular sexes."

Notably, the Second Circuit declined to address whether Title VII protects against discrimination on the basis of transgender status, stating that that issue is a "distinct question" not before the court in *Zarda*. Approximately a week after the *Zarda* decision, the Sixth Circuit (which covers Ohio, Kentucky, and Tennessee) held, in a separate case, that transgender discrimination is also a form of sex discrimination under Title VII.

EMPLOYER TAKEAWAYS

Employers should review their anti-discrimination and anti-harassment policies to make sure that sexual orientation is listed as a protected class, and educate employees about sexual orientation discrimination as part of the employer's harassment training program.

Keep in mind that many states and municipalities – including New York, New York City, and California – already have laws prohibiting discrimination on the basis of sexual orientation, so *Zarda* should not impact employers' day-to-day approach with respect to LGBTQ employees in those jurisdictions. Employers in jurisdictions that do not already have these laws are strongly encouraged to recognize sexual orientation as a protected class as part of a best practice to treat all employees equally and with respect.

Finally, employers should be cognizant of – and train managers on how to respond appropriately to – workplace issues involving dress and grooming standards, bathroom use, and performance reviews, which can lead to potential harassment or discrimination against LGBTQ employees – and to tailor management directives, training, and policies accordingly.

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